Significant Competition Law Changes In Germany

New Rules on Merger Control, Market Dominance, Damages Claims, and Cartel Fines

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03/09/2017

Antitrust Law | Mergers + Acquisitions, Antitrust Law | Cartels, Antitrust Law, and Competition Law | Europe

Client Alert

Deutsche Version

On March 9, 2017 the German Federal Parliament passed the ninth amendment to the Act against Restraints of Competition (ARC) (Gesetz gegen Wettbewerbsbeschränkungen). The amendment is expected to come into force in Q2/2017 and will substantially change German competition law.

The reform is driven in part by formal requirements to implement EU legislation into national German law (in particular, provisions of Directive 2014/104/EU, the “Cartel Damages Directive”), and to eliminate some inconsistencies between EU and German law in the area of cartel enforcement. But it also aims to adjust the domestic competition law framework to some of the challenges that come with big data, two-sided markets, and with the digital economy more generally.

For companies and investors doing business in Germany, the new law brings a number of practical changes:

• It introduces a new transaction value threshold for mergers to require clearance by the German Federal Cartel Office (FCO) (Bundeskartellamt);
• It expands the FCO’s tool box to assess market power when dealing with “big data” or network effects in digital markets;
• It improves the position of plaintiffs to establish the damages amount in follow-on cases by introducing a statutory presumption of cartel infringements causing harm, while at the same time specifying (and facilitating) the defendants’ pass-on defense;
• It extends the limitations period for cartel damages claims from three to five years;
• It introduces some elements of U.S.-style discovery to civil damages litigation in cartel cases, by granting both parties access to the other side’s internal documents when arguing damages amounts and pass-on issues;
• It exempts small and medium enterprises (SMEs) as well as the leniency applicant from joint and several liability for cartel damages;
• It limits the plaintiff’s exposure to having to cover the statutory counsel fees of all opposing parties under the “loser pays” principle;
• It makes it easier to settle cartel damages claims finally and bindingly because the risk of contribution claims from other cartelists will be reduced;
• It puts an end to certain practices of avoiding monetary fines from cartel investigations by restructuring the affected corporate entities;
• It harmonizes the German approach towards parental liability for cartel fines with EU law;
• It enhances the FCO’s abilities to exchange information with other regulatory agencies like the data protection authorities and vice versa; and
• It responds to some sector-specific lobbying efforts by exempting certain cooperations among newspaper and magazine publishers from (German) antitrust scrutiny.

The reform is the first major competition law change since 2013 and the first major change in the area of private cartel enforcement since 2005. However, with digitalization constantly driving market changes, it seems a safe bet that subsequent changes will come within much shorter periods of time. In particular, the new law itself asks that the federal government shall monitor the application of some of the new rules, and report back to Parliament after a three-year period. And prior to the recent reform, although it did eventually not materialize, there was also a discussion about broadening the FCO’s regulatory scope toward a general consumer protection agency.

Details

**New Merger Control Thresholds**

Traditionally, German merger control follows a pure revenue-based approach to determine whether a proposed transaction is reportable for mandatory FCO clearance. Both parties to the transaction must have combined worldwide revenues of more than €500 million; one party to the transaction (e.g., the buyer) must have German revenues of more than €25 million; and another party to the transaction (e.g., the target) must have German revenues of more than €5mn.

Under the new law, these revenue thresholds will remain in place and if a transaction meets all three of them, it will continue to be reportable already on these grounds. In addition, the new law introduces a **transaction value test** to still cover transactions that only meet the higher one of the two domestic thresholds, i.e. where the target has less than €5 million German revenue. These transactions shall require FCO clearance if

- the transaction value exceeds €400 million (to be determined on the basis of the purchase price as agreed as a cash compensation or in another form, including assumed liabilities); and
- the target has “significant” business in Germany, as demonstrated for example by a strong domestic customer base or substantial domestic R&D activities.

The purpose of this adjustment is to capture transactions that may not (yet) be sizable by revenue standards, but that may nevertheless have a competitive impact, for example, because they concern some innovative start-up business. According to the new law’s official reasoning, which explicitly refers to the Facebook/WhatsApp merger in that respect, it is this type of transactions that triggered the introduction of the additional threshold. However, while Facebook’s acquisition of WhatsApp did not trigger the existing turnover thresholds in Germany at the time, the acquisition was notified to the European Commission for a full review under the EU Merger Regulation, as the relevant jurisdictional thresholds in at least three other Member States were satisfied. It was then cleared unconditionally in October 2014.

**Enhanced FCO Tool Box for Assessing Market Power**

With a particular focus on dealing with digital businesses, the new law expands the FCO’s tool box when it comes to defining markets and assessing market power. These new rules will apply

- in a **merger control** context when the FCO needs to assess whether a transaction results in a significant impediment to effective competition under the SIEC test; and
- in **investigations of specific business practices** that the FCO might deem to be an abuse of market dominance.
In particular, the new law introduces the following provisions, which to a large extent come as legislative clarifications of practices that the FCO has already developed in more or less established case law over the last few years:

- **Clarification that it does not require any cash flow between supply and demand side for a “market” to exist.** In traditional German case law, a “market” in competition law terms only existed where goods or services were offered for (cash) remuneration. As a consequence, legislative tools for regulating market structures or behaviors did not apply to “free” services. But regulators had already reconsidered this view in recent years, and this is now explicitly reflected in statutory law.

- **Criteria to determine market power on multi-sided markets.** The new law picks up a number of criteria that the FCO’s own task force for the digital economy identified as relevant factors to assess an undertaking’s role in a given market, namely:
  - Direct and indirect network effects;
  - Multi-homing (parallel use of services) and users’ switching costs;
  - Economies of scale in conjunction with network effects;
  - Access to competitive data; and
  - Innovation-driven competitive pressure.

  Again, these concepts are not entirely new, and have at least in part already been applied in recent FCO and court cases.

Overall, these changes will likely not shift the focus of the FCO’s merger control and antitrust enforcement but they may well lower the FCO’s threshold for exerting its discretion when launching an investigation into “new” markets or business practices, and help the FCO argue a theory of harm in big data and other “digital” cases.


When the new law comes into force, Germany is already late in implementing the EU’s Cartel Damages Directive into national law (the two-year implementation period lapsed on December 27, 2016). At the same time, and compared to other EU Member States, even legacy German law provided for a relatively well developed framework for private cartel enforcement. This is why German courts have already increasingly seen these cases, just like the Netherlands and the UK as the other preferred jurisdictions. With Germany’s new law coming into force, and with potential post-Brexit scenarios in mind, this trend may well continue.

Key changes to the legal framework for bringing cartel damages claims under German law include:

- **Rebuttable presumption of harm:** It shall be legally assumed that cartel infringements generally lead to damages but the infringer shall have the right to rebut this assumption. The assumption shall apply to the existence of the harm as such and to the causality link with the infringement but not to the amount of damages caused. When rebutting the assumption, the defendant can still argue—with sufficient evidence—that the infringement did not cause any price increases. But the burden of proof for establishing the actual quantum of harm remains with the plaintiff.

- **Passing-on defense:** The new law specifies the principle of the passing-on defense, and also facilitates it compared to the existing standards as developed in German case law. Accordingly, the defendant in an action for damages can invoke that the claimant passed on the whole or parts of the overcharge to its own customers, but the defendant shall bear the burden of proof to establish the underlying facts for this defense. In doing so, under the new German law, the defendant can now demand certain disclosures from the claimant (see below). In addition to that, the defendant is no
longer required to prove that the passing-on of charges caused no reduction in demand for the claimant’s products or services.

• **Claims from indirect purchasers:** By specifying the passing-on rules, the new law also facilitates claims from indirect purchasers. It introduces a statutory presumption for the benefit of the indirect purchaser that the direct purchaser passed on the overcharge. This presumption shall apply if the indirect purchaser proves that it was supplied with cartelized products (or products based thereon) and that there was a cartel infringement causing an overcharge at the level of the direct purchaser.

• **Disclosure requirements:** The new law introduces certain tools for both the claimant and the defendant in a cartel damages case to require the respective other party to disclose some of its internal documents and calculations. This disclosure claim can be enforced together with, or separately from, the damages claim, including by way of preliminary injunction. In particular, on the defendant’s side, this will make it easier to argue the passing-on defense. However, leniency applications and settlement agreements must not be disclosed. More generally, any disclosure shall be subject to a proportionality test, and the disclosing party can request to be compensated for its disclosure-related expenses.

• **Statute of limitations:** Under legacy German law, cartel damages claims became time-barred within three years from the end of the calendar year in which the damages claim arose and if the claimant knew (or should have known) about the relevant underlying facts. The new law extends this limitation period from three to five years. The additional principles on suspension effect (during the infringement proceedings and now also during the newly introduced disclosure proceedings) and on the ten-year maximum limitation period (counted from origination of the damages, e.g., payment of the overcharge, and independent from knowledge) will generally continue to apply.

• **Joint and several liability:** The new law introduces some exemptions from the general principle that the participants in a cartel shall be jointly and severally liable for the full damages amount. Going forward, the joint and several liability of SMEs (as defined in the Commission’s Recommendation 2003/361/EC), as well as recipients of full immunity during the infringement proceedings, shall generally be limited to their own direct or indirect purchasers or providers, i.e., again subject to some exemptions, and no longer apply to other injured parties.

• **Settlement effects:** Under existing German law, there is a risk for each cartelist that a settlement with one claimant will still not prevent the other cartelists from bringing contribution claims against the settling defendant. The new law makes settlements binding upon the other cartelists to the extent that the share of damages settled is concerned. This will make individual settlements for cartelists more attractive. However, it is unclear whether this will apply to already existing claims or only to cartel damages claims arising in the future.

• **Cost exposure in follow-on litigation:** In German civil proceedings, the “loser pays” principle applies, i.e., the plaintiff faces the risk of having to cover the statutory attorneys’ fees for all defendants. In follow-on litigation, that was also the case where only one cartelist had been sued, but the cartelists then dragged other cartelists into the proceedings as “intervenors” to prepare the grounds for contribution claims. In cartels with many members, the plaintiff therefore faced a considerable cost risk, which is now being reduced by the new law. The losing plaintiff will only have to pay the statutory attorneys’ fees of the actual defendant(s) and one intervenor. Those statutory fees are determined according to the amount in dispute.

**Liability and Succession: Closing the “Sausage Gap”**

In response to an urgent demand from the FCO, the new law expands the liability for monetary fines in cartel cases. In part, this goes back to a specific case in the German meat industry where the FCO had issued a €130 million fine against a certain corporate entity. As a result of an internal restructuring, the addressee of the fine had then ceased to exist and thereby managed to avoid its liability.
This loophole, commonly referred to as the “sausage gap”, will no longer be available. Under the new law, not only the addressee of the fine, but also its legal successor shall be liable for FCO fines and, more generally, the new law establishes a principle of parental liability as it already exists under EU competition law. Accordingly, a parent company can now be held liable for fines that were only imposed on its subsidiary, even where the parent was itself not involved in the competition law infringement or where it did not violate any supervision duties in relation to the subsidiary.

**Information Exchange Among Regulatory Authorities**

The new law provides for extended options for the competition authorities to share case-related and general market information with other regulators, including personal data and business secrets. In particular, it adds the data protection authorities to the list of other regulators with whom the FCO shall cooperate, and also lists the respective supervisory bodies for the financial and other sectors. These additions are aimed to enhance the enforcement powers in big data cases, where Germany sees a specific need for the FCO to include data privacy considerations in its competition law analysis, and also for the data protection authorities to assess a data processor’s market power as part of their own analysis.

**Facilitating Cooperations in Certain Industry Sectors**

The new law introduces a sector-specific exemption for all non-editorial cooperations (for instance, sale of advertisements) among newspaper and magazine publishers from the cartel ban. Such cooperations shall thus not be subject to antitrust scrutiny. The publishing industry had successfully lobbied for this relief against the background of shrinking advertising and sales revenues in the changing market environment where they are facing increasing competitive pressure from digital media. The new law now therefore potentially allows even hardcore-restrictions (such as price agreements) among publishing houses where they are deemed to be required to preserve the diversity of the press and its ability to compete internationally. During the legislative process, similar exemptions had also been requested in favor of cooperations among public broadcasters and mutual savings banks, but those did eventually not become part of the new law.

With all these sector-specific provisions, however, it must be noted that they can legally only effect the non-application of the cartel ban as provided for in German law, but not a non-application of EU Community-level antitrust law. So wherever a certain sector cooperation has a cross-border dimension to it, it will thus remain subject to full scrutiny under Article 101 of the Treaty on the Functioning of the European Union (TFEU).

**Outlook**

After almost two years of intense discussions in the antitrust community, at least in part guided by a dedicated EU law framework, the new German competition law generally comes with few surprises; but it still contains a number of paradigm shifts that will have material practical implications going forward.

With regard to merger control, the supplemental transaction value test is less clear than the existing revenue-based filing thresholds. Even where the lower domestic revenue threshold is not met, the parties to a transaction will still have to apply further efforts to determine whether a filing would be required. At least until some further FCO guidance is available on the new criteria, we will likely see more German filings even in smaller cases, just because the merging parties want to mitigate any potential risk of violating filing (and gunjumping) requirements.

In cases where the new law adopts a number of principles from recent case law with respect to market definitions and assessing dominance, these additions will not have an immediate impact on the business community. Nevertheless, the changes may still pave the way for the FCO to continue, and maybe even intensify, its sometimes tough approach toward
the digital economy. Here, the new framework may help the FCO to come up with a more robust theory of harm and to ultimately defend it in court.

Finally, a number of provisions in the revised damages law will require clarification by the courts, for example, this concerns the specifics of the mutual disclosure requirements, and also whether some provisions (e.g., the new settlement rules) shall only apply to newly brought claims – or also retroactively apply with regard to damages occurred (and claimed) prior to the introduction of the new law. In the short term, these uncertainties will likely result in interim proceedings and thereby delay the overall collection of damages, but in the mid- and longer term, when other EU Member States will likewise have implemented the Cartel Damages Directive, this may ultimately also shape Germany’s current perception as a preferred venue for cartel damages litigation.